



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC NO 14 OF 2013

BERNARD ONKUNDI OTUNDO1ST PLAINTIFF
BERNABAS KIPRONO BWAMBOK.....2ND PLAINTIFF
KEFA NYAMONGO OENGA..... 3RD PLAINTIFF
DANCAN OCHIENGE OYARO..... 4TH PLAINTIFF
KENNETH ODUOL ESAU..... 5TH PLAINTIFF
JAMES KAMBO MUTHUSI 6TH PLAINTIFF

VERSUS

CREEK MARKETING AND DEVELOPMENT LIMITED.....DEFENDANT

RULING

1. This is the Notice of Motion dated 31st may, 2017. It is brought under Order 11, Rule 3 (i) (h), Rule 3 (2) f, g, j, m and Order 51 Rule 1 of the Civil Procedure Rules 2010, Section 1A, 1B, 3A and 63 (e) of the Civil Procedure Act Chapter 21 Laws of Kenya.
2. It seeks orders that;
 - a. There be consolidation of this suit with (Mombasa) HCCC No. 609 of 2011, BARNABAS KIPRONO BWAMBOK AND 5 OTHERS –versus- CREEK MARKETING AND DEVELOPMENT LIMITED for purpose of hearing and determination of issues arising out of the two suits.
 - b. Mombasa ELC No. 14 of 2013, BERNARD ONKUNDI OTUNDO AND 5 OTHERS –versus- CREEK MARKETING AND DEVELOPMENT LIMITED be the lead file for purposes of the hearing.
 - c. The costs of this application be costs in the cause.
 - d. Any other or further relief that this Honourable Court may deem fit, necessary, just and fit to grant in the circumstances.
3. The grounds are on the face of the application and are listed as paragraph a – m. I do not need to reproduce them here.
4. The application is supported by the affidavit of Stephen Blanchet, a Director of the Defendant Company sworn on the 31st May, 2017.
5. There is a replying affidavits sworn by Bernard Onkundi Otundo, the 1st Plaintiff sworn on the 13th July, 2017.
6. On the 17th July 2017, it was agreed between the parties that the application be disposed by way of written submissions. On the 28th July 2017, a date for ruling given.

THE DEFENDANTS/APPLICANTS SUBMISSIONS

7. It is the Defendants contention that it has been dragged into two separate suits by the same Plaintiffs over the same transaction relating to the same land.

That consolidation will expedite the resolution of disputes rather than having two separate trials. There exists two suits; Mombasa ELC No. 14 of 2013 and Mombasa HCCC No. 609 of 2011. The subject matter is Plot No. Kilifi/Mtwapa/403.

8. They have put forward the case of *Nyati Security Guards And Services Limited –versus- Municipal Council of Mombasa (2014) eKLR* where Judge D. Maraga (as he then was) set out the guiding principles as follows at Page 1;

“The situation in which consolidation can be ordered including where there are two or more suits or matters pending in the same court where;

1. Some common question of law or fact arises in both or all of them; or,

2. The rights or relief claimed in them are in respect of or arises out of the same transaction or series of transactions, or

3. For some other reasons, it is desirable to make an order for consolidating them....

The circumstances in which suits can be consolidated are broadly similar to those in which parties may be joined in one action. Accordingly actions relating to the same subject matter between the same Plaintiff and the same Defendant or between the same Plaintiff and different Defendants or between different Plaintiffs and the same Defendants may be consolidated.”

9. They have also put forward the case of *Chimweli Janga Mangale And 3 Others –versus- Hamisi Mohammed Mwawazaa And 15 Others (2016) eKLR*. Further that Sections 1A, 1B and 3A of the Civil Procedure Act support consolidation by the court.

10. They also relied on *Kenya Anticorruption Commission –versus- Wilson Gachanja And 2 Others (2014) eKLR* where Honourable Justice J. M. Mutungi allowed consolidation of six separate suits.

Joseph Okoyo –versus- Edwin Dickson Wasuma (2014) eKLR.

THE PLAINTIFFS’/RESPONDENTS’ SUBMISSIONS

11. The Plaintiffs/Respondents in opposing the application have put forward the case of *Benson Mutahi –versus- Raphael Gichovi Munene Kabutu And 4 Others, ELC No. 258 of 2013 (Kerugoya)*.

Where Honourable Justice B. N. Olao in his determination as to whether consolidation is an option to the case cited or quoted the case of *Law Society of Kenya –versus- Centre for Human Rights And Democracy Supreme Court of Kenya Petition No 4 of 2013* where the Supreme Court of Kenya had this to say about consolidation of suits.

“The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide of framework for a fair and impartial dispensation of justice to the parties consolidation was never meant to confer any undue advantage upon the party that seeks it nor was it intended to occasion any disadvantage towards the party that opposes it.”

12. It is the Plaintiffs contention that there are no similar questions of law or fact arising from the two complaints neither are the reliefs sought similar or arise out of the same transition. That the Mombasa HCCC No. 609 of 2011 is a fraudulent and illegal suit.

13. That consolidation will not only taint the suit herein but also occasion grave prejudice to the Plaintiffs. The Defendant stands to unjustly benefit from the sought after consolidation by continuing to enjoy and earn mesne profits from the Plaintiffs property as their intention for consolidation is with a view of obfuscating the real issues in controversy and delaying the determination of this suit.

14. They have also relied on the case of *Cecilia Kiajimbae And Another –versus- Evangeline Tirindi Josphat And Another HC Succession Cause No. 152 of 2008* where it was held that”,

“... Consolidation should not lead to injustice or prejudice or unnecessary hardship to any party.....”.

15. That this application is an abuse of the court process as it is being used to perpetuate a suit that on its onset and throughout is an illegal and fraudulent one. He prays that the application be dismissed.

16. I have considered the pleadings in the two cases and the written submissions of both counsels and the authorities cited. The issue for determination is whether the two suits ought to be consolidated.

17. I have seen a copy of the complaint in HCCC No. 609 of 2011 annexed to the supporting affidavit of Stephen Blanchet sworn on the 31st May, 2017.

The Plaintiff’s prayer are;

i. A declaration that the Defendant has unjustly enriched himself at the Plaintiffs' expense and is liable to make restitution to the Plaintiffs by paying to the Plaintiffs the sum of Kshs.3,350,000/= plus interest there on from 19th July, 2011 until payment in full for total failure of consideration.

ii. In the alternative, the Plaintiffs prays for a declaration that the Plaintiffs have an equitable lien over all identifiable assets of the Defendant consequent to the said unjust enrichment and that the Plaintiffs are at liberty to follow their money into its products until *restitutio in integrum*;

iii. In the alternative, the Plaintiffs' pray for;

a. General damages for breach of contract.

b. Special damages in the sum of Kshs.3,350,000/=

c. Interest on (a) and (b) above at court rates from 19th July, 2011 until payment in full.

iv. In the alternative, the Plaintiffs prays for;

a. Specific performance of the sale agreement dated 21st July, 2011.

b. Loss of user in respect of the property at market rates from the date of effective default by the Defendant to __ 1st November, 2011 until specific performance is enforced.

v. Costs of this suit.

18. The prayers in ELC No. 14 of 2013 though worded differently are the same as those in HCCC No. 609 of 2011. The only difference is that in ELC No. 14 of 2013 the Defendant has put in a counterclaim.

19. In his replying affidavit sworn on the 13th July 2017, the 1st Plaintiff states in paragraph 16;

“That it is true that the finding of the Learned Judge afore said was not appealed against, reviewed or set aside. Mombasa HCCC No. 609 of 2011 was not instituted on the instruction of the Plaintiffs and was fraudulently suit meant to fleece the Plaintiffs.”

In paragraph 17 he states;

“That it is true that as Mombasa HCCC No. 609 of 2011 is not the Plaintiffs' suit and is fraudulent and illegal, the suit herein ought not to be consolidated with the said suit as consolidated it with this matter will irredeemably taint the suit herein.”

20. The 1st Plaintiff appears to object to consolidation on the basis that they did not instruct anybody to file Mombasa HCCC No. 609 of 2011 on their behalf. This is rather curious given that the facts are similar to those in present suit. As to whether they did instruct anybody or not to file it, will come out during the hearing of these two suits.

21. The Plaintiffs cannot wish away and or ignore the existence of Mombasa HCCC No. 609 of 2011. The suit does exist and it is pending. Therefore no doubt that these two suits are between the same parties, the same subject matter. The issues arise out of the same transaction.

22. The Civil Procedure Rules mandate this court to consider consolidating suits with a view of furthering expeditious disposal of cases under 11 Rule 3(i) (h). The two suits are still at pretrial stage hence the right time to consolidate.

23. The Plaintiffs have not demonstrated what prejudice they will suffer if these two suits are consolidated. Consolidation will afford the parties an opportunity to deal with the issues arising out of the said transaction once and for all.

24. I am guided by the principles laid down in the case of *Nyati Security Guards And Services Limited –versus- Municipal Council of Mombasa (2014) eKLR*. I allow the consolidation for purposes of achieving the overriding of the Civil Procedure Act and that it's for expeditious and proportionate disposal of civil disputes.

25. In essence I find merit in this application and I grant the orders sought namely;

i. That this suit is hereby consolidated with MOMBASA HCCC NO. 609 OF 2011, BERNABAS KIPRONO BWAMBOK AND 5 OTHERS –VERSUS- CREEK MARKETING AND DEVELOPMENT LIMITED for purposes of hearing and determination of the issues arising out of the two suits.

ii. That MOMBASA ELC NO. 14 OF 2013, BERNARD ONKUNDI OTUNDO AND 5 OTHERS –VERSUS- CREEK MARKETING AND DEVELOPMENT LIMITED be the lead file for purpose of hearing and recording of proceedings.

iii. That costs of this application be in the cause.

It is so ordered.

Dated, Signed and Delivered at Mombasa on the 16th day of November 2017.

L. KOMINGOI

JUDGE

16/11/2017

Mr. Njoroge : I pray for a mention date to confirm the availability of the other file and pretrial other issues.

L. KOMINGOI

JUDGE

Court : Mention on 25th January 2018 for pretrial directions.

L. KOMINGOI

JUDGE